IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES F. BOESEN,

Defendant.

No. 4:05-cr-00262-JEG

ORDER

This matter is before the Court on Defendant James F. Boesen's Motion for New Trial and Motion for Extension of Time Within Which to File New Trial Motion, both of which are resisted by the Government. Hearing was held on the motions on September 27, 2007. Defendant was represented by attorney Mark Weinhardt. The Government was represented by Assistant United States Attorney Mary Luxa. Despite the Defendant's efforts to currently argue both procedural and substantive issues, the Court restricted the argument to the pivotal procedural questions. The matter is now fully submitted for review.

T. SUMMARY OF MATERIAL FACTS

On December 14, 2005, the Grand Jury filed a fifty-seven-count indictment in the abovecaptioned case charging Defendant James Boesen ("Defendant") and co-Defendant Peter V. Boesen with conspiracy to commit health care fraud (count one) and fifty-five specific acts of health care fraud (counts two through fifty-six). The indictment also contained a forfeiture count (count fifty-seven). On February 15, 2006, the Grand Jury filed an eighty-four-count superseding indictment charging both defendants with conspiracy to commit health care fraud (count one) and eighty-two specific acts of health care fraud (counts two through eighty-three). The superseding indictment also contained a forfeiture count (count eighty-four).

A joint jury trial against both defendants began on July 24, 2006. At the close of the Government's case in chief, Defendant moved under Federal Rule of Criminal Procedure 29 for a

¹ See Defendant's Motion for Order Requiring Resistance on the Merits (Clerk's No. 243), denied by the Court on September 26, 2007.

judgment of acquittal, and renewed the motion at the close of all of the evidence in the case. The Court reserved ruling on Defendant's motion, and on the conspiracy count against Peter Boesen, pursuant to Rule 29(b). The Court informed counsel, and the record reflects counsel understood, a verdict would be obtained and the Court would then address the reserved rulings.

The jury returned its verdict on August 7, 2006, finding both Defendant and co-Defendant Peter Boesen guilty on counts one through eighty-three of the superseding indictment.² After excusing the jury, the Court announced it was prepared to then address its reserved ruling under Rule 29. Counsel were asked if they wished to make any additional record, to which they declined.

As required under Rule 29, the Court considered the evidence presented as of the close of the Government's case and in the light most favorable to the jury's verdict.³ Upon careful consideration, the Court concluded no reasonable jury could find Defendant guilty beyond a reasonable doubt of any of the counts charged against Defendant. Thus, the Court granted Defendant's Rule 29 motion, together with co-Defendant's motion on the conspiracy count, as James Boesen was the only available co-conspirator. At that time, the Court asked if the parties had any other matters to bring before the Court, and counsel for the co-Defendant made an oral motion for judgment of acquittal, pursuant to Rule 29(c)(2), and in the alternative, for new trial, pursuant to Rule 33. The Court denied the oral motions, indicating it would act on the written motions to follow. With no further record made, the Court recessed the trial. On August 8, 2006, the Court entered a written judgment of acquittal as to all counts charged against James Boesen in the superseding indictment.

² Count eighty-four, the forfeiture count, was not presented to the jury. The Court determined the proper forfeiture amount during post-trial proceedings.

³ Because the Court addressed the evidence as in the record at the close of the Government's case, and in the light most favorable to the verdict, it was of no moment that the jury had actually found the Government had not sustained its burden of proving several of the overt acts alleged to have been committed by James Boesen in furtherance of the conspiracy.

On September 5, 2006, the Government filed a notice of appeal from the Court's order granting Defendant's Rule 29 motion, which the Eighth Circuit Court of Appeals received on September 12, 2006. On May 29, 2007, the Eighth Circuit reversed this Court's order granting Defendant's motion for judgment of acquittal and remanded the case with instructions to reinstate the jury's verdict. The original opinion included a footnote (footnote two) that addressed the viability of a Federal Rule of Criminal Procedure 33 motion for new trial upon remand.

On June 12, 2007, Defendant filed a petition for rehearing en banc, and on June 22, 2007, the Eighth Circuit granted Defendant's petition for panel rehearing, vacated its opinion and judgment dated May 29, 2007, and filed a revised panel opinion.⁴ On August 9, 2007, the Eighth Circuit issued the formal mandate.

United States v. Boesen, No. 06-3290, 2007 U.S. App. LEXIS 12350, at *15 n2 (8th Cir. May 29, 2007), opinion vacated, withdrawn from publication, and superseded on reconsideration by United States v. Boesen, 491 F.3d 852 (8th Cir. 2007).

Defense counsel argues the Eighth Circuit omitted footnote two in response to the motion for rehearing because it was either taking a neutral position on the new trial issue or the Eighth Circuit agreed with Defendant's position regarding the new trial issue. Like the parties, this Court can only speculate the Eighth Circuit omitted footnote two because Defendant had never raised the new trial issue before the district court, thus the issue was not properly before the Eighth Circuit. United States v. Boberg, 565 F.2d 1059, 1062 (8th Cir. 1977) (finding the new trial issue was raised for the first time on appeal; therefore, the Eighth Circuit declined review, concluding the proper procedure for obtaining a new trial is by motion to the district court).

⁴ The revised opinion deleted the prior footnote two, which provided as follows: On remand, Mr. Boesen intends to request a new trial. Rule 33 provides that "upon defendant's motion" a district court may grant a new trial if the motion is filed within seven days after the verdict or finding of guilty (for any reason other than newly discovered evidence). Fed. R. Crim. P. 33; see also Fed. R. Crim. P. 29(d)(1) (if "the court enters a judgment of acquittal after a guilty verdict, the court must also determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed") (emphasis added). Mr. Boesen did not file a motion for a new trial. The district court does "not have the power under Rule 33 to order a new trial sua sponte." United States v. Martinson, 419 F.3d 749, 752 (8th Cir. 2005); see also United States v. Moran, 393 F.3d 1, 10 (1st Cir. 2004) (a motion for a new trial is untimely when first made after remand from a reversal of a judgment of acquittal).

On June 1, 2007, two days after the Eighth Circuit issued its original panel opinion, Defendant filed in this Court, for the first time, a Motion for New Trial; and on August 15, 2007, six days after the Eighth Circuit issued its mandate, Defendant filed a second Motion for New Trial. The Government timely resisted both motions, arguing any motion for a new trial was untimely.⁵ On August 30, 2007, Defendant filed a motion captioned "Extension of Time Within Which to File New Trial Motion" and argued Defendant's motion for new trial was timely, or in the alternative, the Court should extend the deadline for filing a new trial based on excusable neglect.

The Government resists, arguing Defendant did not file a motion for new trial within seven days of the jury's verdict, nor did Defendant move for the Court to rule in the alternative conditionally granting a new trial motion as required by Rule 29(d)(1).

APPLICABLE LAW AND DISCUSSION II.

"Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(2). It is undisputed Defendant's motion for a new trial is not based on newly discovered evidence and that Defendant did not make a Rule 33 motion within seven days of the jury's verdict. In arguing his motion for new trial is not untimely, Defendant claims the Court's entry of a judgment of acquittal constitutes a final judgment that terminated the prosecution against him, thereby tolling the sevenday time period contained in Rule 33(b)(2). Defendant contends the Eighth Circuit's mandate restarted the seven-day period under Rule 33(b)(2); thus his motion filed on August 15, 2007, was

⁵ The Government has not responded to the substantive arguments in Defendant's new trial motions, and defense counsel has characterized the Government's response as a disfavored piecemeal approach. However, to have responded to the substantive issues would have put the Government at risk of waiving its timeliness objection. See Eberhart v. United States, 546 U.S. 12, 19 (2005) (finding the time limits in Rule 33 are not jurisdictional but instead "claimprocessing rules", and the Government forfeits a defense of untimeliness under Rule 33 where the defense is not raised until after the district court had reached the merits of the motion).

within seven days of the issuance of the mandate and therefore is timely.⁶ The Government asserts the judgment of acquittal did not toll the seven-day time period contained in Rule 33(b)(2), and the seven-day time period began to run on August 7, 2007, the day the jury returned its guilty verdict against Defendant.

1998 Amendments to Rule 33 Α.

The amendments to Rule 33 indicate it is the verdict or finding of guilty in the district court, and not a "final judgment" of the appellate court, that triggers the seven-day time period contained in Rule 33. Prior to the 1998 amendments to Rule 33, the time for filing a motion for new trial based on newly discovered evidence began to run from entry of the "final judgment" in the case, whereas a motion for new trial on any other ground began to run from the entry of the verdict or finding of guilty. The former version of Rule 33 stated,

> A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

Fed. R. Crim. P. 33 (1997) (amended 1998, 2002, 2005).

Under the pre-1998 version of Rule 33, in considering when the two-year period from the "final judgment" began to run, courts concluded the term "final judgment" referred to action of the court of appeals and not the action of the district court. See United States v. Spector, 888 F.2d 583, 584 (8th Cir. 1989) ("The appellate process terminates and the two-year time period for a Rule 33 motion begins to run when the appellate court issues its mandate of affirmance."); United States v. Hoyte, 125 F.3d 849, (table) 1997 WL 600053, at *1 (4th Cir. Sept. 30, 1997) (unpublished per curiam) (same); United States v. Reyes, 49 F.3d 63, 66 (2d Cir. 1995) ("[C]ourts have uniformly looked to the date of action in the court of appeals."); United States v. Dayton, 981 F.2d

⁶ While Defendant argues it is the mandate that restarts the seven-day period, defense counsel states that "out of an abundance of caution" counsel also filed a motion for new trial within seven days of the Eighth Circuit's original panel opinion.

1200, 1203 (11th Cir. 1993) (considering action of the court of appeals); United States v. Cook, 705 F.2d 350, 351 (9th Cir. 1983) (same); United States v. Gross, 614 F.2d 365, 367 n.2 (3d Cir. 1980) (same).⁷

The two different interpretations of what constituted the final judgment of the appellate court for purposes of Rule 33's two-year time period led to the potential for disparity in the amount of time a defendant would have to file a motion for a new trial based on the ground of newly-discovered evidence. The 1998 Amendments to Rule 33 sought to rectify this inconsistency.

> It is the intent of the Committee to remove that element of inconsistency by using the trial court's verdict or finding of guilty as the triggering event. The change also furthers internal consistency within the rule itself; the time for filing a motion for new trial on any other ground currently runs from that same event.

Advisory Committee's Notes on 1998 Amendments to Fed. R. Crim. P. 33.

The 1998 Amendments also extended the time for filing a new trial motion based on newly-discovered evidence from two years to three years to compensate for "what would have otherwise resulted in less time than that currently contemplated in the rule for filing such motions." Advisory Committee's Notes on 1998 Amendments to Fed. R. Crim. P. 33. Rule 33's pre-1998 amendment use of both "final judgment" and "after the verdict or finding of guilty" demonstrates these two triggering events are not one and the same. The language change and extension of the time period in which to file a new trial motion based on newly-discovered evidence indicates Rule 33 no longer contemplates any appellate court action constitutes a triggering event for purposes of the time periods contained in Rule 33. Therefore, the Court

⁷ Although the majority of courts interpreted the term "final judgment" to mean the issuance of the appellate court's mandate, a few district courts interpreted "final judgment" to mean the issuance of the appellate court's decision. Compare Spector, 888 F.2d at 584 (issuance of mandate); Hoyte, 125 F.3d 849, at *1 (same); Dayton, 981 F.2d at 1203 (same); Cook, 705 F.2d at 351 (same); Gross, 614 F.2d at 367 n.2 (same); with United States v. DeCarlo, 848 F. Supp. 354, 355-56 (E.D.N.Y. 1994) (using date of appellate court's opinion affirming the district court); United States v. Arzola, No. 87 Cr. 692, 1991 WL 120365, at *1 (S.D.N.Y. June 21, 1991) (same).

concludes either a verdict or a finding of guilty by the district court triggers Rule 33's time period for filing a motion for new trial based on any grounds. Thus, under a plain language reading of Rule 33(b)(2), a motion for new trial in Defendant's case had to be filed within seven days of the August 7, 2007, jury verdict.

Application of Rule 33 В.

Defendant argues the circumstances presented in this case are unique because the district court granted judgment of acquittal immediately following the return of the guilty verdict. Defendant argues (1) the Court's judgment of acquittal amounted to a "final judgment," which terminated the prosecution against Defendant; and (2) the Court's action thereby denied Defendant the seven-day time period under Rule 33 in which to make his new trial motion. The Government disputes that the judgment of acquittal terminates the litigation between the parties, asserting the Government's appeal was not barred by double jeopardy and the judgment of acquittal was a "final judgment" only for purposes of appeal.

1. **Final Judgment**

The cases cited by Defendant in support of his assertion that a judgment of acquittal is a final judgment terminating the litigation against a defendant involve either a determination of finality for purposes of appeal under 28 U.S.C. § 1291 or the double jeopardy bar. See Sanabrai v. United States, 437 U.S. 54, 77-78 (1978) (finding the mid-trial judgment of acquittal constituted a final judgment because double jeopardy barred a Government appeal); Fong Foo v. United States, 369 U.S. 141, 143 (1962) (finding where the district court directed the jury to return verdicts of acquittal as to the defendants, and a formal judgment of acquittal was subsequently entered, double jeopardy barred review and thus the judgment of acquittal was a final judgment terminating the proceedings); United States v. Black Lance, 454 F.3d 922, 924 (8th Cir. 2006) (finding mid-trial acquittal constituted a final judgment terminating the proceedings because double jeopardy barred appeal); <u>United States v. Stewart</u>, 452 F.3d 266, 272 (3d Cir. 2006) (concluding a district court's 18 U.S.C. § 4243(e) order committing an individual to the Attorney General's custody was an appealable final order under 28 U.S.C. § 1291); United States v.

Martinez, 763 F.2d 1297, 1311 (11th Cir. 1985) (stating for purposes of appeal, the judgment of acquittal was a final judgment and holding double jeopardy did not bar the Government's appeal of the judgment of acquittal).

"Finality is variously defined; like many legal terms, its precise meaning depends on context." Clay v. United States, 537 U.S. 522, 527 (2003). The relevant context in this case is the time for filing a Rule 33 motion after a post-verdict grant of a judgment of acquittal and how that acquittal impacted, if at all, Defendant's ability to file a Rule 33 motion within seven days of the jury's verdict.

"When the district court enters an order that is in effect an acquittal, 18 U.S.C. § 3731 precludes an appeal by the government." Black Lance, 454 F.3d at 925. However, 18 U.S.C. § 3731 only precludes an appeal by the Government where the Double Jeopardy Clause is implicated by the appeal.

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

18 U.S.C. § 3731. A judgment of acquittal thus does not automatically result in the termination of the prosecution or preclude an appeal by the Government in every case in which one is entered. Serfass v. United States, 420 U.S. 377, 392 (1975) (finding the word acquittal "has no talismanic quality for purposes of the Double Jeopardy Clause"); see also Black Lance, 454 F.3d at 924 (same). Instead, for a judgment of acquittal to constitute a final judgment prohibiting further proceedings in a case, the Double Jeopardy Clause would need to be implicated to preclude further prosecution against a defendant.

"[W]hat constitutes an 'acquittal' is not to be controlled by the form of the judge's action." United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977). "Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." Id. It is thus the procedural context of a judgment of acquittal that determines whether a judgment of acquittal constitutes a final judgment terminating further proceedings in a criminal case. See Serfass, 420 U.S. at 392 ("[A]n 'acquittal' cannot be divorced from the procedural context in which the action so characterized was taken.").

A judgment of acquittal granted either mid-trial or at the close of all of the evidence, but prior to a jury verdict, constitutes a final judgment terminating further proceedings because double jeopardy bars the Government from appealing such judgments of acquittal. See United States v. Scott, 437 U.S. 82, 97 (1978) (observing that when the district court enters a judgment of acquittal before the jury returns a verdict, double jeopardy bars a Government appeal, as long as the district court "evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction"); Sanabria, 437 U.S. at 77-78 (holding double jeopardy barred review of the district court's mid-trial judgment of acquittal); Black Lance, 454 F.3d at 924 (finding the district court's dismissal with prejudice mid-trial was the functional equivalent of an acquittal, not a mistrial, and the Government therefore could not appeal the district court's ruling).

Where a judgment of acquittal is granted after the jury has returned a guilty verdict, the Double Jeopardy Clause is not implicated because a successful Government appeal does not necessitate further fact-finding; rather, the jury's verdict is simply reinstated. <u>United States v.</u> Boesen, 491 F.3d 852, 855 (8th Cir. 2007) (finding Government could appeal the district court's post-verdict judgment of acquittal under 18 U.S.C. § 3731 because reversal would only reinstate the jury's verdict, thus the Double Jeopardy Clause was not implicated); United States v. Mundt, 846 F.2d 1157, 1160 n.4 (8th Cir. 1988) ("Where a jury returns a verdict of guilty but the trial court thereafter enters a judgment of acquittal, an appeal is permitted.").

2. Timing of the Post-Verdict Judgment of Acquittal

Defendant argues the circumstances of this case are unique because the district court granted judgment of acquittal immediately following the return of the guilty verdict. The Court disagrees.

Rule 29 does not require the district court to conditionally rule on a motion for a new trial in every circumstance in which a motion for new trial is made. For example, if judgment of acquittal is entered (1) prior to submission to the jury, or (2) after submission to the jury but before the jury reaches a verdict, double jeopardy would bar a new trial in either of those circumstances, thus the district court need not conditionally rule on a motion for new trial.⁸ Rule 29(d)(1) contemplates the posture of this case, as the plain language of Rule 29 makes clear it is only where the district court enters a judgment of acquittal after a guilty verdict that the district court, pursuant to the dictates of Rule 29(d)(1), must conditionally rule on any motion for a new trial.

It is of no consequence whether the Court entered the judgment of acquittal directly following the publishing of the jury's verdict, or if the Court had entered the judgment of acquittal at some later date, because a judgment of acquittal is not a triggering event under Rule 33; the seven-day time period contained in Rule 33 began to run on August 7, 2007, the date of the jury's verdict.

In United States v. Renick, the Eleventh Circuit Court of Appeals addressed the precise issue presented here, that is,

> [W]hether the seven-day period for filing a motion for new trial is tolled during a period between the grant of judgment of acquittal and the issuance of a mandate reversing the grant of judgment of acquittal, particularly when the grant of judgment of acquittal comes before the seven-day period for filing a motion for new trial expires.

⁸ The Court notes that double jeopardy bars a new trial, and therefore a Government appeal, only in those instances where the pre-verdict judgment of acquittal was based upon the district court's evaluation of the sufficiency of the evidence. Where a defendant seeks to terminate the proceedings on any basis other than factual guilt or innocence and thereby obtains a judgment of acquittal, the Double Jeopardy Clause is not implicated. Scott, 437 U.S. at 98-99 ("[T]he defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant.").

United States v. Renick, 273 F.3d 1009, 1019 (11th Cir. 2001). In Renick, the day after the jury returned a guilty verdict, the district court, having previously reserved ruling on the defendants' Rule 29 motions, granted the defendants a judgment of acquittal. <u>Id.</u> at 1016. Thereafter, the defendants failed to make a Rule 33 motion within seven days of the jury's guilty verdict. Id. The Government appealed the judgment of acquittal, and the Eleventh Circuit reversed the district court's ruling. Id. at 1017. After the mandate issued and the case was remanded for reinstatement of the jury's verdict, the defendants filed motions for new trial, arguing the time for filing their Rule 33 motions was tolled until the mandate issued. <u>Id.</u> After initially announcing it would grant new trials for both defendants, the district court concluded it had granted the new trials under a mistaken understanding of the effect of the 1998 amendments to Rule 33, and that the correct result was to conclude the defendants' motions for new trial were untimely. Id. The Eleventh Circuit affirmed, holding the district court correctly determined it could not review the substance of the untimely Rule 33 motions. Id. at 1021. "It is not unusual for there to be motions for judgments of acquittal and conditional motions for new trial. The grant of the motions for judgment of acquittal in this case did not change the date of the return of the guilty verdict." Id. at 1020.

> To allow a delay in filing a motion for new trial would raise the concern expressed in **Smith** that such a practice would authorize the appellate process to be exercised in an advisory capacity while the trial court, regardless of the appellate opinion, could set aside all that was the basis of appeal.

<u>Id.</u> at 1021 (quotation omitted) (emphasis added).

Defendant attempts to distinguish Renick by arguing the judgment of acquittal did not occur in that case until after the seven-day period had run. However, the Renick court found it unnecessary to decide whether the crucial date was the date of the guilty verdicts, the date of the forfeiture verdicts, or the date of the district court's written order granting the judgment of acquittal "because the subject motions for new trial were not filed within seven days of any such date." Id. at 1020. Defendant also asserts United States v. Cronic, 466 U.S. 648 (1984), on which the Renick court relied in part, held the district court was procedurally barred from granting a new trial motion following a judgment of conviction during the pendency of an appeal. This assertion is similarly inaccurate. The Cronic court held,

> The District Court denied [defendant's Rule 33 motion] for lack of jurisdiction because the case was pending on direct appeal at the time, but that ruling was erroneous. The District Court had jurisdiction to entertain the motion and either deny the motion on its merits, or certify its intention to grant the motion to the Court of Appeals, which could then entertain a motion to remand the case.

Id. at 667 n.42 (emphasis added).

Defendant argues when a defendant moves for a judgment of acquittal and the district court grants the judgment of acquittal, if the judgment of acquittal is reversed on appeal and the case is remanded to the district court, then the district court must rule on a defendant's motion for a new trial. In each case cited by Defendant, however, a timely Rule 33 motion had been made, and the district court had failed to make the conditional ruling required by Rule 29(d)(1). See United States v. Ward, 274 F.3d 1320, 1321 (11th Cir. 2001) (district court failed to rule on the timely motion for a new trial and the court of appeals remanded to the district court for ruling on the motion for new trial); United States v. Kellington, 217 F.3d 1084, 1091 (9th Cir. 2000) (district court denied defendant's new trial motion as moot without indicating, as required by Rule 29(d)(1), how the district court would rule on the motion, thus the court of appeals remanded with instructions to rule on the merits of defendant's Rule 33 motion); United States v. Arrington, 757 F.2d 1484, 1485 (4th Cir. 1985) (when district court failed to rule on defendant's timely new trial motion, court of appeals concluded that on remand district court had jurisdiction to rule on the motion); United States v. Dixon, 658 F.2d 181, 193 (3rd Cir. 1981) (same). Unlike the cases cited by Defendant, the Court did not fail to rule on a timely Rule 33 motion as required by Rule 29(d)(1), rather, Defendant never made such a motion.

Relying on <u>United States v. Thorpe</u>, No. 95-CR-626, 1998 WL 422844, at *1-2 (E.D.N.Y. July 22, 1998), Defendant asserts that a defendant is not required to move for a new trial if judgment of acquittal is granted during the seven days following the jury's verdict because it would impose an impractical and unworkable burden on a defendant. Although factually similar to the

circumstances presented here, Thorpe provides minimal guidance and therefore is unhelpful to Defendant.

In <u>Thorpe</u>, the defendant moved for judgment of acquittal under Rule 29. <u>Id.</u> at *1. The district court denied defendant's motion and sua sponte granted its own judgment of acquittal after the jury's verdict. Id.; see also Calendar Entry, United States v. Thorpe, No. 1:95-cr-00626 (E.D.N.Y. January 30, 1996); Judgment of Acquittal, <u>United States v. Thorpe</u>, No. 1:95-cr-00626 (E.D.N.Y. January 31, 1996). On appeal, the court of appeals reversed the judgment of acquittal and remanded the case. <u>Id.</u> at *1. Thus, the issue before the district court in <u>Thorpe</u> was whether the defendant was required to make a Rule 33 motion within seven days of the jury's verdict where the Court had sua sponte made a Rule 29 ruling. Id. The district court concluded, "due to the Court's sua sponte judgment of acquittal, there was no verdict or finding of guilt, therefore, no basis for a Rule 33 motion. To hold otherwise would serve to impose an impractical and unworkable burden on the Defendant." Id.

Unlike the Thorpe court, this Court did not sua sponte grant a judgment of acquittal under Rule 29. Rather, as the record clearly reveals, the Court reserved ruling on Defendant's preverdict Rule 29 motion. At the close of all evidence but before the verdict was published, Defendant renewed his Rule 29 motion for judgment of acquittal but did not move in the alternative for a new trial under Rule 29. After the jury verdict was published, the Court ruled on the defendants' Rule 29 motions. The Court denied co-Defendant Peter Boesen's motions other than on the conspiracy count and granted Defendant's motion for judgment of acquittal. Necessarily, the Court did not enter a conditional ruling on a motion for new trial as to Defendant as there was no such motion before the Court.

Furthermore, assuming without deciding the Court agreed with the Thorpe decision, the Court cannot conclude filing a new trial motion within seven days of the verdict when the Court

⁹ The Court further notes co-Defendant Peter Boesen moved for both judgment of acquittal and in the alternative for a new trial.

granted a post-verdict judgment of acquittal poses any impractical or unworkable burden on a defendant, as nothing prevented Defendant from making the motion orally.

Double jeopardy did not bar the Government from appealing the post-verdict judgment of acquittal, and therefore the judgment of acquittal did not constitute a final judgment terminating the Court's jurisdiction or further proceedings in Defendant's criminal case. Taken in combination, Rule 33 required that a motion for new trial be filed within seven days of August 7, 2006, and Rule 29(d)(1) required the Court to conditionally rule on any such motion. Because the Court had no such motion before it within seven days of August 7, 2006, the Court must conclude Defendant's Rule 33 motion for a new trial is untimely.

Defendant argues the word "any" in Rule 29(d)(1) means the burden is on the Court to rule in the alternative whether a new trial should be conditionally granted, even in the absence of a motion by Defendant. Focusing on the inclusion of the word "motion," the Court disagrees and finds the Advisory Committee notes to the 1966 amendments to Rule 29 instructive.

> References in the original rule to the motion for a new trial as an alternate to the motion for judgment of acquittal and to the power of the court to order a new trial have been eliminated. Motions for new trial are adequately covered in Rule 33. Also the original wording is subject to the interpretation that a motion for judgment of acquittal gives the court power to order a new trial even though the defendant does not wish a new trial and has not asked for one.

Advisory Committee's Notes on 1966 Amendments to Fed. R. Crim. P. 29. The courts of appeals having addressed the issue agree. Martinson, 419 F.3d at 752 (finding where defendant moved for a judgment of acquittal, but failed to move for a new trial, district court committed no error by not granting a new trial sua sponte, because it did not have the authority to do so); see also United States v. Navarro Viayra, 365 F.3d 790, 794 (9th Cir. 2004) ("The Committee Notes leave no doubt that the court may not order a new trial in the absence of a motion by the defendant."); Moran, 393 F.3d at 9 ("[A] district court does not have the authority, sua sponte, to convert a motion for judgment of acquittal into a motion for a new trial."); United States v. Brown, 587 F.2d

187, 189 (5th Cir. 1979) (finding a district court is "powerless to order a new trial except on the motion of the defendant.").

Defendant argues the Eighth Circuit applies a liberal construction of Rule 33 in order to assure decisions on the merits of new trial motions in questionable timing situations, citing United States v. Johnson, 982 F.2d 1192 (8th Cir. 1992), United States v. Villalpando, 259 F.3d 934 (8th Cir. 2001), and <u>United States v. Cruz-Padilla</u>, 227 F.3d 1064, 1067 (8th Cir. 2000). These cases are all distinguishable from the present case.

In <u>Johnson</u>, the Eighth Circuit concluded the district court entered a post-trial order granting an extension of time to file a Rule 33 motion, but it was not clear what deadlines were being extended. Johnson, 982 F.2d at 1196. Due to the ambiguity in the district court's order, the Eighth Circuit held a liberal construction of Rule 33 was warranted. <u>Id.</u> Here, no such ambiguous extension was granted.

In Villalpando, the defendant timely filed a motion for new trial; however, the district court did not rule on the motion before appointing defendant new counsel. Villalpando, 259 F.3d at 938. After appointing new counsel, the court requested supplementation of defendant's original motion for new trial. Id. Although the supplementation was filed after the seven-day time period contained in Rule 33, the Eighth Circuit found the supplementation merely specified a claim that had previously been timely made, and the circumstances therefore warranted a liberal construction of Rule 33. Id. Again, Defendant never made a timely motion in this case.

In Cruz-Padilla, although the defendant made a timely oral motion for new trial two days after the jury reached its verdict, the district court simply failed to rule on the motion. Cruz-<u>Padilla</u>, 227 F.3d at 1067. The defendant filed a second new trial motion well after the seven-day time period and argued the written motion merely renewed his timely oral motion, which the district court had failed to rule on. Id. The Eighth Circuit concluded the circumstances of Cruz-<u>Padilla</u> amounted to a "technical misunderstanding" warranting a liberal construction of Rule 33. Id. Once again, Defendant never made a timely motion in this case; therefore, the Court did not fail to rule, rather the Court had no motion to rule upon.

The Court concludes Rule 29(d)(1) is designed to avoid the exact circumstances presented in this case. Rule 33 clearly states a motion for new trial on any basis other than newlydiscovered evidence must be filed within seven days of the verdict. Defendant's motion was not filed within seven days of the jury verdict, and the Court can find no reasonable interpretation of the relevant caselaw, Rule 29, or Rule 33 to justify the tolling of the time period contained in Rule 33. The Court concludes Defendant's motion for new trial is untimely, and therefore the Court also must deny the motion without a consideration of the substantive merits.

Excusable Neglect under Rule 45

Defendant next argues even if there is a timeliness defect in his motion for a new trial, any such defect should be remedied by Federal Rule of Criminal Procedure 45(b)(1)(B), which allows a retroactive extension of time in cases of excusable neglect. See Fed. R. Crim. P. 45(b)(1)(B) ("When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made . . . after the time expires if the party failed to act because of excusable neglect."). Defendant asserts excusable neglect is demonstrated by (1) the highly uncertain and divided state of the law on the timeliness issue, (2) defense counsel's good faith attempt to ascertain that law, and (3) the Government's own misconception regarding the timeliness issue.

In Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380, 390-95 (1993), the United States Supreme Court articulated four factors to be considered when determining whether an out-of-time filing constitutes "excusable neglect." The Supreme Court concluded "the determination is at bottom an equitable one," and the factors to be considered include (1) "the danger of prejudice to the [opposing party]," (2) "the length of the delay and its potential impact on judicial proceedings," (3) "the reason for the delay, including whether it was within the reasonable control of the movant," and (4) "whether the movant acted in good faith." Id. at 395. 10 The Supreme Court, however, clarified "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." Pioneer, 507 U.S. at 392; see also Ceridian Corp. v. SCSC Corp., 212 F.3d 398, 404 (8th Cir. 2000) ("Pioneer did not alter the traditional rule that mistakes of law do not constitute excusable neglect."). The Court addresses each of these factors in turn.

Regarding the first Pioneer factor, despite Defendant's argument to the contrary, the Government would be prejudiced by having to prosecute Defendant in a new trial after a second, unnecessary delay caused by Defendant's untimely motion. In the event the Court were to grant Defendant's motion, the Government would have the right to an immediate appeal. See 18 U.S.C. § 3731. Trial in Defendant's case began in July 2006, and the appeal concluded with the Eighth Circuit's issuance of the mandate in August 2007. Given the duration of the Government's previous appeal, despite the diligence of our colleagues on the Eighth Circuit and assuming the Eighth Circuit agreed with the Court's decision to grant a new trial, it would be approximately another year before a scheduling order for a new trial could even be set. Thus, Defendant's failure to timely file a motion for a new trial would have caused an additional year delay before a new trial could commence. Because the potential for witnesses to become unavailable and for their memories to fade with the passage of time, Defendant's procedural conduct would prejudice the Government.

In addressing the second Pioneer factor, Defendant justifies the length of the delay in filing the motion for a new trial arguing he "could not have sought a new trial in this Court once the government filed a notice of appeal." This argument is unpersuasive. The Government filed its notice of appeal twenty-eight days after the entry of Defendant's judgment of acquittal. By then, Defendant had already missed the deadline for filing a motion for new trial by twenty-one days.

¹⁰ Although in Pioneer the Supreme Court considered the term excusable neglect as found in Bankruptcy Rule 9006, the Court subsequently clarified that the Pioneer factors applied to claims of excusable neglect in criminal cases. Stutson v. United States, 516 U.S. 193, 196 (1996).

Furthermore, this Court does not lose jurisdiction to consider a motion for a new trial when the Government files an appeal. See Cronic, 466 U.S. at 667 n. 42; United States v. Reeves, 83 F.3d 203, 208 (8th Cir. 1996) ("Although district courts are prohibited from granting a motion for a new trial while an appeal is pending, they are not prohibited from denying such a motion or from certifying an intention to grant the motion to this court, which can then entertain a motion to remand the case." (citation omitted)).

Defendant's cited reason for the delay, Pioneer's third factor, is equally unpersuasive. Defendant suggests the "ambiguous and divided" state of the law on this procedural issue required defense counsel to spend hours of research and after consultation with the Government, ultimately conclude not to file a motion for new trial. Assuming the state of the law was, as Defendant describes it, "ambiguous and divided," taking action and filing a motion for a new trial within seven days of the jury's verdict would have been a cautious, prudent thing to do, akin to the various steps taken much later with an espoused goal of abundant caution. Defense counsel's decision not to file the motion, upon contemporaneous legal research, discussion, and reflection, therefore appears strategic, not neglectful. After the Eighth Circuit issued its opinion, defense counsel filed a motion for new trial "in the abundance of caution," even though defense counsel believed the issuance of the mandate, not the opinion, triggered the running of the clock. The same caution could have justified action within seven days of the entry of the jury's verdict.

Defendant's suggestion the Government had a similar misconception regarding Rule 33 is not beyond dispute. At hearing, AUSA Luxa stated during informal conversations with defense counsel on August 8, 2007, defense counsel informed her if the Eighth Circuit reversed the district court's judgment of acquittal, Defendant would file a motion for new trial. AUSA Luxa stated she then advised defense counsel of the seven-day deadline contained in Rule 33. Defense counsel responded stating he did not recall being so advised, but instead stated that during this same informal conversation another AUSA, who was not assigned to Defendant's criminal case but was present for the informal discussions, appeared to agree with Defendant's position that no motion

needed to be filed within seven days. Defendant suggests the tacit approval of an AUSA who was not assigned to Defendant's case gave Defendant the impression the Government would not contest the timeliness of a new trial motion should Defendant turn out to be wrong. Ms. Luxa recalls they specifically did not concur with the procedural view of defense counsel, which she confirmed in a January 17, 2007, letter while the matter was on appeal. At hearing, the highly capable defense counsel conceded he reached his own conclusions and placed no reliance on the opinions of anyone from the United States Attorney's Office in making the decision not to file the motion for a new trial within seven days.

Regarding the fourth Pioneer factor, the Court finds Defendant has been forthcoming with his reasons for not filing the motion for new trial within seven days of the judgment of acquittal, none of which suggest Defendant acted other than in good faith.

In sum, however, the Court must conclude the Pioneer factors do not weigh in Defendant's favor. Rather, the Court finds Defendant delayed due to a mistake of law or a strategic decision, neither of which provide a legal basis for a finding of excusable neglect. Pioneer, 507 U.S. at 392.

III. **CONCLUSION**

After carefully considering the record and the posture of the current motions, the Court concludes it is compelled to find Defendant's Motion for New Trial (Clerk's No. 218 and 232) is untimely and therefore must be **denied**. Similarly, Defendant's Motion for Extension of Time Within Which to File New Trial Motion (Clerk's No. 244) must be **denied**.

IT IS SO ORDERED.

Dated this 16th day of October, 2007.

UNITED STATES DISTRICT COURT